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10 **UNITED STATES BANKRUPTCY COURT**
NORTHERN DISTRICT OF CALIFORNIA

11 In re: Case No. 08-55860 RLE
12 TVIA, INC., Chapter 11
13 Debtor. Date: March 30, 2010
14 Time: 10:00 a.m.
Place: Courtroom 3099
Hon. Roger L. Efremsky

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16 **LIMITED OBJECTION OF U.S. TRUSTEE TO TVIA FEE APPLICATIONS**

17 The United States Trustee (the "UST") hereby files the following limited objection
18 to the fee application filed in this case by Campeau Goodsell Smith ("CGS"), and
19 responds to the fee application and supplement filed by Sheppard, Mullin, Richter &
20 Hampton LLP ("Sheppard") as follows:

21 **CGS.** CGS seeks fees of \$83,940, which includes \$2,900 of fees incurred
22 preparing its fee application. CGS was engaged by Tvia, Inc. both pre- and post-
23 petition, to serve as special litigation counsel. The litigation concerned alleged trade
24 secret and other violations by former Tvia employees. A state court trial was
25 scheduled to begin on or about May 4, 2009; however, on April 10, 2009, YC (Yuchen)
26 Zhu was appointed as chapter 11 trustee in this case.

27 CGS was never employed by the chapter 11 trustee. Nonetheless, CGS is
28 requesting payment for services rendered to Tvia after the appointment of the chapter

1 11 trustee. This is contrary to Lamie v. U.S. Trustee, 540 U.S. 526, 124 S.Ct. 1023
2 (2004); see 3 Collier on Bankruptcy (15th Ed.) ¶¶ 327.01 and 327.05[3], pp. 327-5 and
3 327-68 (professionals representing debtor *out of* possession cannot be compensated
4 under § 330 unless retained by trustee). The Lamie rule applies to chapter 11 cases in
5 which a chapter 11 trustee is appointed as well as chapter 11 cases that are converted
6 to chapter 7. In re Johnson, 397 B.R. 486, 490 (Bankr. E.D.Cal. 2008).

7 The UST calculates the fees charged by CGS after April 10, 2009 (the date of
8 the trustee's appointment) to be \$17,380. Of this amount, \$14,480 is related to
9 preparation for trial (see last page of Exhibit C to Declaration of Gregory J. Charles),
10 and \$2,900 is related to preparing the fee application. See CGS Application, p. 8.¹ The
11 UST objects to the payment of this amount (\$17,380) as contrary to Lamie.

12 The UST is sensitive to the trial preparation needs and uncertainties that faced
13 CGS once the trustee was appointed. However, under the Lamie case, the firm is
14 precluded from receiving compensation from the estate unless employed by the trustee.
15 Accordingly, unless CGS is employed by the trustee on a *nunc pro tunc* basis, the UST
16 objects to the payment of \$17,380 of the requested fees.

17 **Sheppard Mullin.** Sheppard Mullin is counsel to the equity committee.
18 Sheppard Mullin requests fees and expenses in excess of \$845,000 for the period May
19 1, 2009 through the effective date of the confirmed plan (December 28, 2009), plus
20 reconsideration of \$12,137 in fees previously disallowed without prejudice. The vast
21 majority of the requested fees were incurred in connection with either (a) the plan and
22 disclosure statement process, or (b) the claims objection and settlement process. At
23 this time, the plan has been confirmed, the major claims and claim objections have
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25 ¹ There is some controversy as to whether a post-conversion professional is permitted to recover
26 fees from the estate for preparing a fee application after a trustee has been appointed. See, e.g.,
27 In re Ancil Plumbing & Mechanical Contractors, Inc., 2009 WL 1150116 (Bankr. D.Mass. April
28, 2009) (denying fee request) and In re Johnson, 397 B.R. 486 (Bankr. E.D.Cal. 2008)
28 (awarding fees after trustee employed professional *nunc pro tunc*). The UST asserts that the
plain language of Lamie should apply and preclude an award of such fees unless the professional
is employed by the trustee *nunc pro tunc*.

1 been resolved, and allowed creditors are receiving a 100% distribution. There will be a
2 distribution to equity holders in an unknown amount.

3 Sheppard Mullin has filed a supplement to its final fee application, in which it has
4 agreed to take certain voluntary reductions in its fees and expenses in response to
5 concerns identified by the UST. The reductions are detailed in the supplement, and
6 total \$59,145 in fees and \$812.25 in expenses. The supplement accurately reflects the
7 resolution of the UST's concerns, and the UST has no further objections to the
8 Sheppard Mullin fee application.

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11 Dated: March 16, 2010

Respectfully submitted,

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By: /s/ John S. Wesolowski
John S. Wesolowski
Attorney for the U.S. Trustee

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